

1933  
FRANK E. CUNNINGHAM, Clerk.

THE WASHINGTONIAN PUBLISHING CO., INC.,  
Plaintiff,

v.

DREW PEARSON, et al.,

Defendants.

Equity No. 55, 429

MOTION OF DEFENDANT, DREW PEARSON, TO DISMISS

THE BILL OF COMPLAINT

Now comes the defendant, Drew Pearson, by Elisha Hanson and Eliot C. Lovett, his attorneys, and moves the Court to dismiss the Bill of Complaint in the above entitled cause; and as grounds for said motion, says:

1. That the facts alleged in the Bill of Complaint fail to state a cause of action.

2. That the Bill of Complaint fails to show that the plaintiff has such an interest in the subject matter as to entitle it to maintain this suit.

3. That the Bill of Complaint fails to show that the plaintiff, if it had any rights, acted with due diligence.

4. That the Bill of Complaint fails to show that the plaintiff had rights prior to those of this defendant in the matter complained of.

5. And other grounds apparent on the face of the Bill.

Elisha Hanson

Eliot C. Lovett

Attorneys for Defendant  
Drew Pearson,  
729 15th St., N. W.,  
Washington, D. C.

To Alan B. David,  
Gibbs L. Baker,  
Attorneys for the Plaintiff.

FILED  
MAR 16 1933

FRANK E. CUNNINGHAM, Clerk.

Please take notice that the points in support of the foregoing motion and the authorities intended to be used, are attached hereto. The rules of the above entitled Court require that if you oppose the granting of the motion you shall, within five days from the date of service of a copy of this motion upon you, or within such further time as the Court may grant, or as the parties to this suit may agree upon, file in reply with the Clerk of said Court a statement of the points and authorities upon which you rely, and serve a copy thereof upon counsel for the defendant in whose behalf this motion is filed.

Elinor Hanson

Eliot C. Lovett

Attorneys for Defendant  
Drew Pearson,  
729 15th St., N. W.,  
Washington, D. C.

Service of a copy of the foregoing Motion and aforementioned points and authorities acknowledged this 14 day of March, 1933.

Alan David

Alan David

Attorneys for Plaintiff.



IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

THE WASHINGTONIAN PUBLISHING CO., INC., )  
Plaintiff, )  
v. ) Equity No. 55,429  
DREW PEARSON, et al., )  
Defendants. )

FILED  
MAR 16 1933

MEMORANDUM, STATEMENT OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION TO DISMISS BILL OF COMPLAINT

The defendant, Drew Pearson, submits the following memorandum<sup>of</sup> points and authorities in support of his motion to dismiss the Bill of Complaint in the above entitled cause.

Foreword

This is a proceeding in equity, brought under the Copyright Act of 1909, as amended, by the Washingtonian Publishing Co., Inc., a Delaware corporation, with its principal place of business in Washington, D. C., to restrain this defendant, among others, from publishing, printing, selling, distributing or circulating to the public for profit, or otherwise, a certain book, "More Merry-Go-Round"; to require the defendants to deliver to the United States Marshal all of the copies of said book now in their possession; and the Marshal to destroy them; to require the defendants to make an accounting of receipts and profits from the sale of said book; and, at the election of the plaintiff, to require the defendants to pay monetary damages at the rate of One Dollar (\$1.00) per page for each printed page of alleged infringing material in the book; and for such other and further relief as the Court may decree.

The facts upon which the litigation is based are these: The Washingtonian was a monthly magazine, published by the Washingtonian Publishing Co., Inc., a Delaware corporation, the entire capital stock of which, prior to April 4, 1932, was owned by the



Mayflower Hotels Corporation of America, which company, in the summer of 1931, was placed in a receivership by order of this Court. Upon taking control of the hotel and its assets, the receivers discovered among the assets the certificates of stock in the Publishing Company. Upon making inquiry, they ascertained that the Publishing Company was indebted to the hotel in a sum in excess of Twenty-five Thousand Dollars (\$25,000) and in fact was insolvent. Without delay, the receivers notified Mrs. Marian Banister, who sometimes designates herself as Mrs. Blair Banister, then editor and publisher of the magazine for the parent company, they would not authorize its further publication or advance any more money for that purpose.

Notwithstanding the specific instructions of the receivers, Mrs. Banister brought out further issues of the magazine, including the December, 1931, issue. The magazine ceased publication with that issue, its second class privileges being revoked in July, 1932, by the Postmaster General of the United States.

Pursuant to an order of this Court, entered April 4, 1932, the receivers sold the stock in the Publishing Company to one James William Bryan, acting for himself and associates, for Five Hundred Dollars (\$500) cash; an agreement to furnish one hundred (100) copies monthly to the hotel for twenty-four (24) months after publication was resumed; and for twenty-four (24) full pages of advertising in one color at a rate of Two Hundred Dollars (\$200) per page.

From the foregoing, it can be seen that from the time the receivers notified Mrs. Banister of their refusal further to authorize the publication of the magazine or the expenditure of any money thereon, the actual publication was without their authority or that of the corporation which was within their control, but was solely on her individual responsibility.

The December, 1931, issue contained, among other things, an article by Rixie Smith, but printed under the pseudonym of



Linthicum Hall, entitled "The Mills - of the Gods". Bankruptcy proceedings against the company, in this Court, indicate Smith was not paid for the article.

While this issue contained a notice reading "Copyrighted 1931 by The Washingtonian Publishing Co.", the bill of complaint shows that the requirements of the Copyright Act of 1909 for the filing of an affidavit and the deposit of copies were not complied with promptly as provided in the Act, that the affidavit was not filed and the required copies deposited with the Register of Copyrights until February 21, 1933, - or more than fourteen months after the last issue of the magazine was published.

Meanwhile, defendant Pearson was engaged in writing a book entitled "More Merry-Go-Round". This was a composite work, with more than one author, and was published by Liveright, Inc., in 1932. It contains much of the article entitled "The Mills - of the Gods", which appeared in the December, 1931, issue of The Washingtonian. But, as the bill of complaint shows, the plaintiff, who claimed copyright in 1931, did not actually register the claim until February 21, 1933, and had knowledge of the publication of "More Merry-Go-Round" in 1932.

In view of the statements made to this Court by the receivers of the Hotel Company, in their petition of April 4, 1932, Equity No. 52,888, for leave to sell the capital stock of the Publishing Company, to the effect that at least the December issue was published without their knowledge or consent, the question is presented as to whether the Publishing Company may claim any rights alleged to accrue during that period of unauthorized publication.



A more important question is whether the plaintiff, in the absence of any satisfactory explanation of the delay of more than fourteen months between the date of claiming copyright and the date of registering the claim, can maintain its action. The bill does not even attempt to explain the long delay, but alleges that the plaintiff's copyright was infringed in 1932 while admitting that plaintiff did not attempt to register its claim of copyright until 1933. The Copyright Act requires prompt application for registration and prohibits suits such as this until registration is completed in the manner specifically provided by the Act.

#### The Law

1. Plaintiff has no right of action because of failure to comply with the provisions of Section 12 of the Copyright Act of 1909, as amended.

The privilege of copyrighting original literary work is conferred by the Act of Congress of March 4, 1909, as amended by the Acts of August 24, 1912, March 2, 1913, and March 28, 1914, known as the Copyright Law of the United States of America. Copyright is initiated under the provisions of Section 9 of the Act, which provides that any person entitled thereto may secure copyright for his work by publication thereof with the notice of copyright affixed to each copy published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under Section 21 of the Act.



Section 10 of the Act provides that the person claiming copyright may obtain registration of his claim by complying with the provisions of the Act, including the deposit of copies, and upon such compliance the Register of Copyrights shall issue to him the certificate provided for in Section 55 of the Act. Insofar as this particular case is concerned, Section 12 of the Act is vital. It reads:

"Sec. 12. That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section fifteen of this Act; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale, there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section eleven of this Act, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with." (Emphasis supplied.)

Pursuant to the law, the Register of Copyrights promulgated rules and regulations for the registration of claims to copyright. Section 24 of the rules and regulations deals with "How to secure registration of published works." This section is also vital to a consideration of this particular complaint. It reads:

"24. Promptly after first publication of the work with the copyright notice inscribed, two complete copies of the best edition of the work then published must be sent to the Copyright Office, with a proper application for registration correctly filled out and a money order for the amount of the legal fee.

"The statute requires that the deposit of the copyright work shall be made 'promptly', which has been defined as 'without unnecessary delay.' It is



not essential, however, that the deposit be made on the very day of publication."

Thus, it will be seen that before either copyright or claim of copyright has any legal standing, it must be registered in the office of the Register of Copyrights and that in order to comply with the requirements for registration, two copies of the published material must be deposited with the Register of Copyrights promptly after publication. The Courts previously have defined the use of the word "promptly" in a legal sense. The words "promptly and without delay" mean "with reasonable promptness, and without unreasonable delay". Burlingame v. Adams Express Company, 171 Fed. 902, 904.

In Whalen v. Western Assur. Co. of Toronto, 185 Fed. 490, 492, the Court voided an insurance policy on a canal boat because the owner did not comply with a provision that "in case of any loss or misfortune, prompt notice of the disaster" should be given to the insured. The notice in this case was not given until nearly a month after the boat sank, and the Court held that this was not prompt compliance with the requirement of the policy, no reason appearing why the owner could not have given such notice at once.

In F. W. Dodge Co. v. H. A. Hughes Co., 72 Atl. 1036, 1039, the Court held that where the plaintiff was required to forward information promptly under the terms of the contract, the plaintiff was obligated to forward such information not "regularly" but without unnecessary delay.

The common meaning of the word "prompt", as taken from Webster's Dictionary, is "ready and quick to act as occasion demands; not dilatory or hesitating; responding instantly; immediate, as prompt in obedience, prompt to go. 2. Done or rendered readily or immediately; given without delay or hesitation, as prompt assistance, obedience."

In this case, it is pertinent to point out that where-as plaintiff claimed copyright of the article alleged to be in-



fringed in December, 1931, plaintiff made no effort to comply with the law requiring the deposit of copies promptly after publication until February 21, 1933. The Bill of Complaint gives no reason for plaintiff's failure so to comply with the law. The Bill of Complaint merely sets up the facts, and such facts, on their face, in the light of the further provision of Section 12 that "no action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with", clearly indicate that the plaintiff has failed to state a cause of action<sup>failed to show</sup> and has/such an interest in the subject matter as to entitle it to maintain this suit.

2. The Act itself interprets the word "promptly".

Sections 13, 21 and 22 of the Act all deal with the use of the word "promptly". Prior to the Act of 1909, one who claimed copyright of a published work had to deposit it within ten days of publication. A case arose where the copy was deposited the day prior to publication and where later suit was brought alleging infringement. The Court, in this case, held that the deposit of copy on the day prior to publication was substantial compliance with the law requiring deposit within ten days of publication. Belford v. Scribner, 144 U. S. 488, 36 L. Ed. 514.

The Act of 1909, as amended, clarified the old statute by providing for the deposit promptly after publication in the office of the Register of Copyrights, and Section 13 of the Act makes further provision that should the copies called for by Section 12 not be promptly deposited, the Register of Copyrights may, at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after demand for deposit has been made, if the proprietor fails to deposit within three months from any part of the United States or six months from an outlying territorial possession, the proprietor "shall be liable to a fine of \$100 and to pay to the Library of



Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void." (Emphasis supplied.)

Section 21 again deals with the question of promptness in complying with the Act. It provides that, in the case of a book first published abroad in the English language, the deposit in the Copyright Office not later than sixty days after its publication of one complete copy will give said book an ad interim <sup>good</sup> copyright thereof/only for four months. Then, Section 22 provides that if, within the ad interim period, an authorized edition of such book shall be published in the United States in accordance with the manufacturing provisions specified in Section 15 of the Act "and whenever the provisions of this Act as to the deposit of copies, registration, filing of affidavit, and the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book for the full term provided elsewhere in this Act." (Emphasis supplied.) Thus, it can be seen that under Section 13, if demand is made for the deposit of copies, such deposit must be made within three months if the copies were published within the United States or the copyright becomes void, and that, in Section 21, in the case of a book published in the English language abroad, only sixty days are allowed for the deposit of copies in order to obtain an ad interim copyright, and that the ad interim period of copyright protection itself is limited to four months.

In this case, the plaintiff admits a lapse of more than fourteen months between the publication of the article and the notice of copyright and compliance with Section 12 of the law requiring deposit of copies in order to secure registration, without which registration no suit for infringement can stand under the provision of Section 12, and, as before stated, no reason is given for this period of fourteen months delay between the time of claiming copyright and the time of alleged compliance with the Act.



3. The plaintiff, if it had any rights in December, 1931, failed to exercise reasonable diligence and is guilty of laches.

In Patterson v. Hewitt, 195 U. S. 310, 322; 49 L. Ed. 214, 219, the Court held that laches may defeat a suit in equity to enforce rights, even though the time fixed by a statute for the prosecution of actions or suits in law or equity has not expired.

The Copyright Act provides, in Section 12, that no action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act, with respect to the deposit of copies and registration of such work, shall have been complied with.

In Hammond v. Hopkins, 143 U. S. 224; 36 L. Ed. 134, 153, Mr. Chief Justice Fuller, speaking for the Court, said:

"No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society by refusing to interfere where there have been gross laches in prosecuting rights or where the long acquiescence in the assertion of adverse rights has occurred." (P. 145.) (Emphasis supplied.)

In Halstead v. Grinnan, 152 U. S. 410, 413; 38 L. Ed. 495, 500, the Court held that the length of time, during which the party makes the assertion of his rights, which must pass in order to show laches varies with the peculiar circumstances of each case, and further, that laches is an equitable defense controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them.

This case involved an alleged violation of trust. The offense, according to the Bill of Complaint, which was not filed until 1884, was actually committed in 1864, and the Court, in denying the relief said:

"Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, - dependent upon the situation of the parties, the extent of their knowledge or means of information..."



In an earlier case, Badger v. Badger, 69 U. S., 2 Wall 8795, the Court held that a party seeking to avoid laches "should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights; otherwise the chancellor may justly refuse to consider his case, on his own showing without inquiring whether there is a demurrer or a formal plea of the statute of limitations contained in the answer."

In some cases, the diligence required is measured by months rather than by years. Pollard v. Clayton, 1 Kay and J, 462; Attwood v. Small, 6 Clark and F, 356.

4. Change in the value of property between the time the cause of action arose and the time the Bill was filed is material to be considered upon the question whether the suit was brought without unreasonable delay.

This suit is over the alleged infringing of an alleged copyright article by the authors and publishers of a book which, in turn, was copyrighted on August 26, 1932. The alleged right of copyright upon which the action is based, according to plaintiff, accrued on December 10, 1931. The actual registration of the copyright, under the terms of which this suit was brought, did not occur until February 21, 1933.

If a copyright be good, the law grants its owner or proprietor a period of twenty-eight years protection. This period is equivalent to the period of statutes of limitations governing actions in other causes. Yet, in Patterson v. Hewitt, supra, the Court said:

"We consider the better rule to be that, even if the statute of limitations be made applicable in general terms to suits in equity, and not to any particular defense, the defendant may avail himself of the laches of the complainant notwithstanding the time fixed by the statute has not expired."

The Court further commented upon Calhoun v. Millard, 121 N. Y. 69, 8 L.R.A. 248, 24 N. E. 27, and said:



"In the last case the question is discussed at considerable length by Chief Judge Andrews, and the conclusion reached that 'the period of limitation of equitable actions fixed by the statute is not, where a purely equitable remedy is invoked, equivalent to a legislative direction that no period short of that time shall be a bar to relief in any case, or precludes the Court from denying relief in accordance with equitable principles for unreasonable delay, although the full period of ten years has not elapsed since the cause of action accrued.'"

#### Conclusion

The Bill of Complaint shows on its face that more than fourteen months elapsed between the original claim of copyright and the registration of said claim of copyright, without which registration suit cannot be brought. The Bill gives no reason for this undue delay, notwithstanding the requirement of the Act that the formalities of registration shall be complied with promptly after the original publication of the material claimed to be copyrighted.

It is respectfully submitted that the Bill is insufficient to warrant this Court in finding for the plaintiff and that the motion of this defendant to dismiss the Bill of Complaint should be granted.

Respectfully,

Ernest A. Pearson

Eliot C. Lovett

Attorneys for Defendant  
Drew Pearson.



IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Holding an Equity Court

THE WASHINGTONIAN PUBLISHING CO., INC., )

Plaintiff, )

vs. )

DREW PEARSON, et al., )

Defendants. )

EQUITY NO. 55429

FILED

MAR 18 1933

FRANK E. CUNNINGHAM, Clerk.

MEMORANDUM IN OPPOSITION TO THE  
MOTION TO DISMISS THE BILL OF COMPLAINT

Now comes the plaintiff, by its attorneys, Gibbs L. Baker and Alan B. David, in opposition to the motion to dismiss the bill of complaint for the reasons set forth in the accompanying memorandum.

Gibbs L. Baker  
GIBBS L. BAKER

Alan B. David  
ALAN B. DAVID

ATTORNEYS FOR PLAINTIFF  
815-15th St. N. W.,  
Washington, D. C.

Service acknowledged this 17<sup>th</sup> day of March, 1933.

Elisha Hanaou

Eliot C. Lovett

ATTORNEYS FOR DEFENDANT, DREW PEARSON



IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

THE WASHINGTONIAN PUBLISHING CO., INC., )

Plaintiff, )

vs. )

DREW PEARSON, et al., )

Defendants. )

EQUITY NO. 55429

FILED

MAR. 18 1933

MEMORANDUM

FRANK E. CUNNINGHAM, Clerk.

The attention of the court is respectfully called to the irrelevant matter sought to be introduced in support of the motion contained in the memorandum filed by the defendant and indicated by the novel designation of "Foreword".

A motion to dismiss, like a demurrer at law, admits the allegations of the bill of complaint on which the motion must rest. No new matter can be introduced by self-serving, ex parte statements such as are contained in the "Foreword" of defendant's supporting memorandum.

The memorandum of defendant suggests as a ground for dismissing the bill that it shows on its face that the two copies of the copyrighted magazine for the month of December 1931 were not deposited with the Librarian of Congress promptly, and not until February 21, 1933, slightly more than a year after the copyright was obtained.

By reference to the Act of Congress of March 4, 1909, as amended, known as the Copyright Act, and to Section 9 thereof, the court will find that copyright protection is not dependent on filing copies with the Register of Copyrights. Under previous acts the filing



of copies was a prerequisite.

"Deposit of printed copy of title of work to be copyrighted as prerequisite to copyright has not been required since enactment of March 4, 1909, c. 320". (Title 17, U. S. Code Annotated, Compiler's Notes of Decisions, Page 67.)

No cases have been decided holding contra..

Failure to deposit copies promptly has no relation to the right to maintain the suit and does not affect the validity of the copyright, nor the protection afforded thereby for a period of twenty-eight years.

The bill alleges the issuance of a certificate of copyright February 21, 1933, on the face of which is stated the fact that the copies required had been filed February 21, 1933. The allegations of the bill as to this exhibit and the exhibit itself demonstrate that no demand has been made by the Register of Copyrights nor penalty assessed for the delay in filing copies.

Section 13 of the Act provides:

"Should the copies called for by section 12 of this title not be promptly deposited as provided in this title, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from anypart of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of \$100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void. "



Section 12 of the Act provides:

" \* \* \* No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with."

The bill of complaint in this case was filed on March 8, 1933, subsequent to the filing of the copies as required by the Act.

It is submitted that the argument that the provisions of the Act have not been complied with, is without merit.

It is contended by the defendant that the delay in filing the copies amounts to laches. The penalty provided for not filing the copies promptly is set out in the statute. The court certainly should not be asked to extend the penalties or to alter or change the provisions of the statute by barring the suit, nor for undue delay in bringing it as a penalty for not filing the copies promptly. Such a holding would be an enlargement of the penalties provided in Section 13 of the Act.

It is further contended by defendant that the bill of complaint should be dismissed for laches.

The protection of the copyright runs for a period of twenty-eight years and the copyright protection is a vested property right.

It is submitted that the suit is providently brought if filed at any time within the period in which the property right of the plaintiff is protected.

The rule usually followed by the courts in applying the doctrine of laches is set up on the memorandum of the defendant by quotation from the Supreme Court of the United States in



Halstead v. Grinnan, 152 U. S. 410, 413; 38 L. Ed. 495, 500, as follows:

"Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, - dependent upon the situation of the parties, the extent of their knowledge or means of information . . . "

Even if statutory property right of the plaintiff in the copyright for a period of twenty-eight years does not justify a suit at any time during that period, there has not been any undue delay in filing the suit. The cause of action arose slightly more than a year before the suit was brought. During all of this time defendants had notice of the infringement of the copyright by the publication on the issue of the magazine in question of the copyright proprietorship of the plaintiff.

Another contention made by defendant is to the effect that the bill of complaint does not show a sufficient interest in the plaintiff to maintain the suit.

If the ownership of property which has been appropriated by the defendant Pearson is not a sufficient interest to maintain the suit, counsel for defendant will have to point out why it is not.

Oral argument is requested.

Respectfully submitted,

Gibbs L. Baker  
GIBBS L. BAKER

Alan B. David  
ALAN B. DAVID  
ATTORNEYS FOR PLAINTIFF  
THE WASHINGTONIAN PUBLISHING CO. INC.



*The Washington Publishing Co.*, Plaintiff  
vs.  
*Drew Pearson et al.*, Defendant

No. 55429  
IN EQUITY

THE PRESIDENT OF THE UNITED STATES to

*Robert S. Allen*

Defendant

**Greeting:** You are hereby commanded as heretofore you have been commanded to appear before the Supreme Court of the District of Columbia to answer a bill of complaint (or petition) exhibited against you in the said Court in a suit in Equity by the above-named plaintiff, and to further do and receive what the said Court shall have considered in this behalf; and hereof fail not.

Witness, The HONORABLE ~~WALTER I. MCCOY~~, Chief Justice of said Court, the 29<sup>th</sup> day of March, A. D. 1933.

FRANK E. CUNNINGHAM, Clerk.

By *Harry M. Luff*, Assistant Clerk.

Attorney.

NOTE.—The defendant is required to file his answer or other defense in the Clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise, the bill may be taken pro confesso. 7-1304

Defendants.

ORDER

Upon hearing on the motion of the defendant, Drew Pearson, to dismiss the bill of complaint filed herein, it is this 24<sup>th</sup> day of April, 1933,

ADJUDGED, ORDERED and DECREED that said motion to dismiss is denied, without prejudice to the right of the defendant to renew the same in answers, and that defendant is granted until April 25, 1933, to answer.

*Joseph W. Cox*  
JUSTICE.

*7/14/33 1321*

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IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

HOLDING AN EQUITY COURT

The Washingtonian Publishing Co., Inc., )

Plaintiff, )

vs. )

Equity No. 55429

Drew Pearson,  
Robert S. Allen,  
Liveright, Inc.,  
and  
Van Rees Press, Inc.

Defendants. )

FILED  
MAY 25 1933  
FRANK E. CUNNINGHAM, Clerk.

MOTION TO STRIKE PARTS OF THE  
ANSWER TO THE BILL OF COMPLAINT

Now comes the plaintiff, by its attorneys, and moves  
the court to strike out that part of Paragraph 6 designated as  
"X"(b)" of the answer and so much of "(a)" of Paragraph 7 as  
states 'except as to the originality of the article, "The Mills - of  
the Gods", and states that this article was jointly conceived by  
Rixie Smith and himself"; all of Paragraph 9; and so much of "X"(a)"  
of Paragraph 10 as states 'upon information and belief, that the  
plaintiff never completed the purchase of the said article by any  
payment to the said Smith therefor'; and all of "X"(c)" of Paragraph 10;  
all of Paragraph 15; all of "(b)" and "(c)" of Paragraph 17; all  
of "(a)" of Paragraph 19; all of "(a)" of Paragraph 22; all of  
"(c)" of Paragraph 22; all of "(d)" of Paragraph 22; all of "(c)"  
of Paragraph 22; all of "(d)" of Paragraph 22; for the following  
reasons:

The subject matter of the foregoing paragraphs and  
parts thereof are irrelevant and immaterial and the plaintiff should  
not be required to join issue thereon.

Gibbs L. Baker  
GIBBS L. BAKER

Alan B. David  
ALAN B. DAVID  
ATTORNEYS FOR PLAINTIFF



To: Elisha Hanson

Eliot C. Lovett,

Attorneys for the defendants.

Please take notice that the points and authorities in support of the foregoing motion are attached hereto. The rules of court require that if you oppose the granting of the motion, you shall, within five days from the date of the service of a copy of this motion upon you, or within such further time as the court may grant, or as the parties to this suit may agree upon, file in reply, with the Clerk of this Court, a statement of the points and authorities upon which you rely and serve a copy thereof upon counsel for plaintiff in whose behalf this motion is filed.

Service of a copy of foregoing motion and aforesaid points and authorities acknowledged this 24<sup>th</sup> day of May, 1933.

Elisha Hanson

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ATTORNEYS FOR DEFENDANT

FILED  
MAY 25 1933

FRANK E. CUNNINGHAM, CLERK



MEMORANDUM OF POINTS AND AUTHORITIES TO  
ACCOMPANY THE MOTION TO STRIKE PARTS OF  
THE ANSWER TO THE BILL OF COMPLAINT AS  
SET FORTH MORE PARTICULARLY IN THE MOTION

MOTION TO DISMISS  
THE BILL

FILED  
MAY 25 1933

FRANK E. SPENNINGHAM, Clerk.

On the 24th day of April, 1933 a motion was filed herein on behalf of the defendant, Drew Pearson, to dismiss the Bill of Complaint. This motion was denied subsequently without prejudice to the right of the defendants to renew the same in answers.

As grounds for said motion the defendant, Drew Pearson, stated:

1. That the facts alleged in the Bill of Complaint fail to state a cause of action.
2. That the Bill of Complaint fails to show that the plaintiff has such an interest in the subject matter as to entitle it to maintain this suit.
3. That the Bill of Complaint fails to show that the plaintiff, if it had any rights, acted with due diligence.
4. That the Bill of Complaint fails to show that the plaintiff had rights prior to those of this defendant in the matter complained of.
5. And other grounds apparent on the face of the bill.



(a) of Paragraph 7

So much of (a) of Paragraph 7 sought to be stricken out is a claim of joint authorship by the defendant Pearson of the copyright article, but does not deny that the article was copyrighted by plaintiff. The claim of joint authorship of the article is immaterial and should be stricken out of the answer.

Paragraph 9

This paragraph denies the ownership of the article copyrighted by the plaintiff. Ownership of the article is immaterial to the issue in this suit and the allegation should be stricken out.

In the case of Harms v. Cohen, 279 Fed. 276, the facts were that a copyrighted musical composition was distributed by the copyright owner to musicians to exploit the music. The defense to the suit for infringement was that this distribution constituted a license to the public.

The court said:

"the copyright owner has exclusive right to print, vend, reprint, publish and copy the copyrighted work and under Section 41 (Comp. Stat. 9562) the copyright is distinct from the property in the material object copyrighted and the sale or conveyance by gift or otherwise of the material object does not of itself constitute a transfer of the copyright, nor does the assignment of a copyright constitute a transfer of the title to the material object" (Italics ours)

It is immaterial whether the defendant Pearson was a joint author of the article or whether 'the said Rixie Smith did for a valuable consideration sell, convey and assign the said article "The Mills - of the Gods" to the plaintiff' or that said Smith received no compensation from plaintiff for said article. It is further immaterial that defendant Pearson paid said Smith for the use of the article.



A memorandum of points and authorities in support of the motion was filed and in opposition the plaintiff also filed a memorandum. The memorandum of the plaintiff is a part of the record and is referred to as part of this memorandum.

Mr. Justice Cox over-ruled the objections to the Bill of Complaint.

Mr. Justice Macmillan: MOTION TO STRIKE THE ANSWER

The allegations of the joint and several answers of the defendants that raise the legal points considered by the court on the motion to dismiss the bill should be stricken from the answers - the ruling of Mr. Justice Cox on the motion to dismiss the bill is stare decisis.

Other parts of the answer sought to be stricken out will be discussed separately.

(b) of Paragraph 6

This sub-paragraph alleges matter that has no relation to the issue involved in this suit. The sub-paragraph does not deny that plaintiff is the owner of the copyright nor does it set up any matter of defense to the infringement thereof. The paragraph is merely a self-serving, extraneous recitation of immaterial allegations.



A similar defense was interposed in the case of Belford, Clarke & Co., vs. Scribner, decided by the Supreme Court of the United States, U. S. 144, page 488, 36 L. Ed. 514. The facts in the case involved an alleged defense to the copyright action on the ground that the authoress of the article who sold it to the appellee, Charles Scribner, was a married woman and that under the law of New Jersey the husband had a property interest in the earnings of the wife and that therefore the sale to Scribner was not complete without the husband's jointure. The court, speaking by Mr. Justice Blatchford said:

"The opinion of the Circuit Court further correctly said: 'It is certain that, if there is any ownership in this work by copyright at all, it is in the complainant, in whose name the copyright was taken and now stands, so far as is shown by the proof in this case. If the law of the domicile of Mrs. Terhune entitles her husband to any part of her earnings that is a matter to be settled between her husband and the complainant and which the defendants cannot interpose as a defense to a trespass upon the complainant's property rights in this copyrighted book'".

If there was a joint authorship between said Smith and defendant Pearson it is a matter between them as to the division of the earnings, if any, but that fact, if it is a fact, does not concern the plaintiff, admittedly the copyrighted owners.

In Lederer vs. Saake, 166 Fed. 810, the court said:

"In a suit for infringement of copyright the fact that a person in whose name copyright was taken is not the author cannot be set up as a defense."



"(a)" of Paragraph 10

It does not lie in the mouth of defendants Pearson and Allen to defend the infringement on the ground that they are informed and believe that the article in question was not purchased from said Smith or paid for. Sufficient possession and title to the article was in plaintiff to secure a copyright and as stated in the case supra, Harms vs. Cohen:

"The intangible property in the copyright is entirely separate and distinct from the ownership of the material object copyrighted"

"(c)" of Paragraph 10

This paragraph is irrelevant and immaterial to the issue presented. The paragraph is not a defense to the allegations of the bill. The December 1931 issue of The Washingtonian was copyrighted and the article "The Mills - of the Gods" was used substantially by defendants in the book known as "More Merry-Go-Round", as is admitted. The fact, if it is a fact, that the owners of the stock of The Washingtonian Publishing Company unsuccessfully interdicted publication of the magazine and refused to furnish further money, and that this court under date of April 4, 1932 ordered the sale of the stock in "The Washingtonian" to a certain party in accordance with a petition filed by certain receivers is utterly immaterial and irrelevant and should be stricken out as surplusage.

Paragraph 15

The gist of this paragraph is that one of the defendants, Liveright, obtained a copyright on the book entitled "More Merry-Go-Round" in which the article copyrighted by plaintiff was used in August 1932 and that defendant Liveright thereby obtained rights which enables it to escape the infringement alleged in the Bill of Complaint.

This proposition of law is entirely disposed of by Harms vs. Cohen, supra.

FILED  
MAY 25 1933  
FRANK E. CONNINGHAM, CLERK.



The copyright by defendant Liveright of the book "More Merry-Go-Round" gave him no rights intervening or otherwise to infringe the copyright of the plaintiff and this paragraph should be stricken out as immaterial.

(b) of Paragraph 17

So far as the allegations of this paragraph relate to the claim on the part of the defendant Pearson that he had a right to use the article because he purchased it from one Rixie Smith in July 1932 the contention is disposed of in the cases cited supra.

So far as the paragraph relates to the alleged failure of registration of copyright in accordance with the law, that question was disposed of by Mr. Justice Cox in overruling the motion to dismiss.

Section 13 of the Copyright Law enables the copyright owner to file copies at any time until the expiration of three months (when he is a resident of the United States) after demand has been made on him by the Register of Copyrights.

In this case no demand was made and the copies were deposited prior to the filing of the bill as required by the Act.

As to the other allegations in this paragraph to the effect that the editor of the magazine, The Washingtonian, is alleged to have obtained the publication of the magazine without authority is no defense, even if it were true.

The paragraph contains no allegation that the copyright itself was abandoned by the plaintiff. The subject matter of the whole paragraph is immaterial to the issue involved and should be stricken out.



(c) of Paragraph 17

The matter of (c) of Paragraph 17 is self serving and immaterial except for the admission by defendants, Liveright and Van Rees Press of the sale of the book entitled "More Merry-Go-Round" containing the infringed copyright article which admits the only material allegation of Paragraph 17 of the Bill of Complaint.

The allegation of (c) of Paragraph 17 to the effect that the defendants Liveright and Van Rees Press are informed and believe that they have the full and exclusive right to the use of the copyrighted article involved in this suit is made irrelevant and immaterial by the copyright of the infringed article by plaintiff in December 1931 which defendants admit. (Cases supra)

(a) of Paragraph 19

The allegations of this paragraph are immaterial and irrelevant under the doctrine of the cases cited supra.

(a) of Paragraph 22

A mere reading of this paragraph discloses its utter irrelevancy to the issues of this case.

(c) of Paragraph 22

The same comment may be made as to the allegations of this paragraph as is made with relation to the preceding paragraph.

(d) of Paragraph 22

The same comment may be made as to this paragraph as has been made with relation to the two preceding paragraphs.

For the reasons set forth the plaintiff submits the paragraphs and parts thereof included in the motion should be stricken out.

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GIBBS L. BAKER

Alan B. David  
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Washington, D.C.



1833  
BIRMINGHAM, ALA.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA  
HOLDING AN EQUITY COURT

The Washingtonian Publishing Co., Inc., )  
Plaintiff, )

v. )

Drew Pearson, et al. )

Defendants. )

Equity No. 55429

STIPULATION

It is hereby stipulated by counsel for plaintiff and counsel for defendants in the above entitled proceeding that counsel for defendants may have until June 12, 1933, to answer the motion of the plaintiff to strike parts of the answer to the bill of complaint.

Sibbs L. Baker

Alan B. David

Attorneys for Plaintiff.

Trisham

Eliot C. Lovett

Attorneys for Defendants.



IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA  
HOLDING AN EQUITY COURT

THE WASHINGTONIAN PUBLISHING CO., INC., )

Plaintiff, )

v. )

DREW PEARSON, et al., )

Defendants. )

Equity No. 55429.

1011 12 1933

FRANK E. CUNNINGHAM, Clerk.

STATEMENT OF POINTS AND AUTHORITIES IN OPPOSITION  
TO MOTION TO STRIKE PARTS OF THE ANSWER TO  
THE BILL OF COMPLAINT

The defendants, Drew Pearson, Robert S. Allen, Liveright, Inc., and Van Rees Press, Inc., by their attorneys, submit the following statement of points and authorities in opposition to the motion to strike parts of the answer to the bill of complaint filed in the above entitled cause.

I.

Plaintiff seeks to strike from the answer the allegations which raise the legal point considered by the Court on the motion to dismiss the bill. The absurdity of this request is shown by the fact that Mr. Justice Cox, in his order denying the motion to dismiss the bill, specifically reserved to the defendants the right to raise the same questions in their answers. The only lawful purpose which plaintiff's motion to strike such allegations from the answers can, therefore, possibly have is to test the sufficiency of that defense prior to the hearing on the merits. This is perfectly proper under Paragraph 33 of the Equity Rules of this Court. Therefore, if this be the purpose of the motion to strike, this Court is now asked to determine the principal point involved in this case, namely, the construction of the



Copyright Act and its requirement for the prompt deposit of copies in order to support an action to enforce rights presumed to have accrued under the Copyright Act, rather than to await its determination upon the trial on the merits as apparently contemplated by Mr. Justice Cox.

## II.

Plaintiff seeks to strike Paragraph 6(b) of the answer on the ground that it does not deny that plaintiff is the owner of the copyright nor does it set up any matter of defense to the infringement thereof. Paragraph 6 of the bill does not allege that plaintiff was the owner of this or any other copyright. It merely states the contents of the magazine in question "from a time previous to the year 1931 and for sometime thereafter" and the extent of the circulation of the magazine. Defendants state in Paragraph 6(a) of their answer that they have no knowledge of the particular facts asserted in Paragraph 6 of the bill, but in Paragraph 6(b) of the answer the defendant Pearson sets forth facts concerning the publication and contents of the magazine and suggests the defense that is later asserted, as specifically contemplated by the order of Mr. Justice Cox denying the motion to dismiss the bill.

## III.

Plaintiff seeks to strike Paragraph 7(a) of the answer on the ground that it alleges joint authorship but does not deny that the article was copyrighted by plaintiff.

Plaintiff, in Paragraph 7 of the bill, alleges that the article was written, composed and created by Rixie Smith and the answer merely seeks to correct that statement. If the question of authorship be immaterial, the plaintiff should not have raised it in his bill.

The question of the copyright which plaintiff claims to



have secured is elsewhere covered in the answer.

IV.

Plaintiff seeks to strike Paragraph 9 of the answer on the ground that it denies the ownership of the article copyrighted by the plaintiff.

Paragraph 9 of the bill alleges the sale, for a valuable consideration, of the article by Rixie Smith to the plaintiff. A careful reading of the answer to this paragraph shows that it denies this allegation and then seeks to explain the basis for the denial. This point having been raised by the bill, it was the duty of the defendants to answer it. If it be immaterial, it should have been omitted from the bill.

V.

Plaintiff seeks to strike Paragraph 10(c) of the answer on the ground it is irrelevant and immaterial to the issue presented and is not a defense to the allegations of the bill.

Paragraph 10(a) of the answer is an admission by defendants Pearson and Allen of the allegations of Paragraph 10 of the bill except as to the purchase of the said article, and Paragraph (b) is a plea by defendants Liveright and Van Rees Press that they have no knowledge of the truth of the allegations. Paragraph (c) is merely a further statement by defendant Pearson as to the right of the plaintiff to publish the article in question in the month of December, 1931, and sets forth that such authority was not existent and that therefore the plaintiff had no right either to publish or to copyright the article as alleged. Neither the bill nor the answer at this point refer to the copyright or ownership thereof, but only to the purchase and publication of the said article.



Plaintiff seeks to strike Paragraph 15 of the answer on the ground that the Copyright by defendant Liveright of the book, More Merry-Go-Round, "gave him no rights, intervening or otherwise, to infringe the copyright of the plaintiff."

Paragraph 15 of the bill alleges that the plaintiff acquired the sole and exclusive rights to the article in question by its alleged copyright thereof. Defendants specifically deny this allegation and state, as a basis thereof, that any rights which might have been available to the plaintiff by compliance with the provision of the Copyright Act became subject to the intervening rights of defendant Liveright.

This raises the principal, if not the only, point involved in this case, namely, the right acquired by the plaintiff by printing a notice of copyright in the December, 1931, issue of its magazine. There was a complete failure on the part of the plaintiff to complete its registration of the copyright by complying with Section 12 of the Copyright Act, which requires the prompt deposit of two copies of the publication with the Commissioner of Copyrights and makes such deposit a prerequisite to the maintenance of any court action based upon the alleged copyright. Plaintiff filed no claim of copyright or application for registration of copyright, or did it deposit the required two copies until more than fourteen months after publication.

Plaintiff contends that the case of Harms v. Cohen, 279 Fed. 276, settles this point and fully supports its motion to strike this defense from the answer. However, that case involved the right of a plaintiff who had taken the necessary steps to comply with Section 12 of the Copyright Act and so qualified for the prosecution of an action alleging infringement of the copyright. In the instant case, however, the principal question is whether or not the plaintiff actually acquired any right which



would give him the privilege of maintaining such an action.

It is the primary contention of the defendants that plaintiff's failure strictly to comply with Section 12 of the Copyright Act precludes him from prosecuting this action, regardless of whether or not defendant Liveright, prior to plaintiff's alleged compliance with the Act, completed registration of the book, "More Merry-Go-Round", by complying with all requirements of the Act the day following publication. As a further defense, defendants allege that the action of defendant Liveright, in publishing during the interval of plaintiff's failure to comply with the Act, gave it an intervening right which is a complete defense to a suit based upon a subsequent compliance with the Act.

The basis for these principal contentions of defendants may be briefly expressed as follows:

1. Plaintiff cannot maintain this action because it failed to comply with the provisions of Section 12 of the Copyright Act.

Section 12 of the Copyright Act of 1909 as amended, provides that after publication of the work, with the notice of the copyright "there shall be promptly deposited in the copyright office or in the mail addressed to the Register of Copyrights, Washington, District of Columbia, two copies of the best edition thereof then published," and that "No action or proceeding shall be maintained for infringement of copyright of any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with".

There can be but little question that the plaintiff failed to comply with the requirement for the prompt deposit of copies, inasmuch as deposit was not made until more than fourteen months after the publication of the notice of copyright. As a matter of fact, plaintiff's counsel admitted in court at the time of the hearing on the motion to dismiss, that the deposit was not



promptly made.

It has been suggested, however, that failure promptly to deposit copies can have no effect, under Section 12, provided copies are ultimately deposited before any suit is instituted. In further support of this suggestion, it is said that the only penalty provided for failure to deposit copies is that set forth in Section 13 of the Act, wherein the Register of Copyrights is authorized to require the deposit of copies and in default thereof "the proprietor of the copyright shall be liable to a fine of \$100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void". This contention overlooks the fact that Section 13 does not make it mandatory for the Register of Copyrights to require the deposit of copies and thus lay the foundation for the imposition of the penalty, but that it merely states that the Register "may" require such deposit.

The Register has no means of knowing when a claim for copyright has been made unless the copy of the work is brought to his attention. The plaintiff ceased to secure registration of copyright with its issue of July, 1931, and so far as the Register of Copyrights was concerned, the magazine may forever have ceased publication with that issue. And there are, no doubt, many publications which come into being but exist for such a short time that copyright registration is never completed. The Register of Copyrights has no means of knowing what publications are being issued with the notice of copyright except where the registration process is completed by the filing of an application and the deposit of copies. It was obviously for this reason that the Register is merely given the authority, but not required, to make demand for such deposit.

On the other hand, the provisions of Section 12 make it mandatory upon the proprietor promptly to deposit copies, and the



only penalty which is definitely provided for not depositing copies promptly is that it shall preclude the proprietor from bringing suit. In the present case, the proprietor did not comply with the requirement, but fourteen months later sought to do so, not for the purpose of perfecting his copyright and securing the usual protection thereunder, but for the obvious purpose of supporting this suit.

Irrespective of any other consideration, it is therefore submitted that the plaintiff herein failed to comply with the requirements of the Act, and is, therefore, not qualified to maintain this action.

2. The defendant Liveright secured intervening rights which preclude the maintenance of this action.

When plaintiff published the notice of copyright, it merely initiated the copyright, as shown by the marginal headnote to Section 9 in the official publication of the Act. This was notice to the public that copyright protection was claimed; in other words, that plaintiff was not dedicating the issue to the public. But the protection could not be secured, accompanied by the right to maintain suit for infringement, until registration was completed and copies were deposited as provided in Section 12.

In the present case, it is admitted that a notice of copyright was published but that no copies were deposited for 14 months, and that such deposit was, therefore, not promptly made. The defendant Liveright published the alleged infringing matter in August, 1932, eight months after publication of copyright and six months before the deposit of copies. Defendant Liveright had every reason to believe that plaintiff had abandoned any intention to comply with the Copyright Act and thus to avail itself of the protection afforded thereby; in other words, that plaintiff had dedicated the material to the public. An examination of the office records would have substantiated this belief, because it



would have disclosed that registration of copyright and deposit of copies had not been made of any issues of plaintiff's publication since July, 1931. This would certainly amount to an estoppel as to defendant Liveright, even though it might not be held to bar suit against alleged infringers for publications which took place after the deposit of copies and the completion of registration.

The position of defendant Liveright thus becomes closely analogous to that of a person to whom is available the defense of intervening rights in a suit involving the infringement of a reissue patent. A reissue patent is one which is granted to take the place of an original patent which has been discovered to be "wholly or partly inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new". 35 U.S.C.A., Sec. 64, R. S. 4916. Intervening rights arise whenever a person manufactures or sells a product, or uses a process, in the interval between the grant of an original patent and the reissue thereof, which acts infringe the reissue claims but do not infringe the claims of the original patent.

It has often been held that a plaintiff is estopped to enforce a reissue patent against a defendant who has acquired intervening rights. Moto Meter Corp. v. E. A. Laboratories (1932), 55 F. (2d) 936; Ashland Fire Brick Co. v. General Refractories Co. (1928), 27 F. (2d) 744; Bull Dog Floor Clip Co. v. Munson Mfg. Co. (1927), 19 F. (2d) 43, 46. See also Krauth v. Autographic Register Co. (1921), 285 Fed. 199. This theory is based upon the assumption that the defendant has relied upon an apparent dedication of everything disclosed in the original patent but not claimed therein. And it has been held that actual knowledge of and reliance upon the original patent is not necessary to sup-



port the estoppel theory. See Moto Meter Corp. v. E. A. Laboratories, supra, and Autopiano Co. v. American Co. (1915), 222 Fed. 276. A defendant may well be charged with constructive notice of all issued patents. Olsson v. U. S. (1931), 72 Ct. Cl. 72.

It is not definitely settled as to the protection which a defendant may be accorded in the enjoyment of his intervening rights. It has been held that the defendant acquired an irrevocable license under the reissued patent. Autopiano Co. v. American Co., supra. Other decisions hold that the license terminates with the filing of the reissue application. Naivette, Inc., v. Bishinger, (1932), 61 F. (2d) 433. The best considered cases on the subject hold that the infringing acts must have taken place before the filing of the reissue application. Howe v. Coffield (1912), 197 Fed. 541; Ashland Fire Brick Co. v. General Refractories Co., supra. See also Naivette, Inc. v. Bishinger, supra. Other cases indicate that the acts must take place before the grant of the reissue application. Autopiano Co. v. American Co. and Krauth v. Autographic Register Co., both supra.

Some courts have gone farther than the estoppel theory and have held that a broadened reissue is void on the grounds of intervening rights. General Electric v. Richmond (1909), 178 Fed. 84; Supreme Co. v. Security Co. (1924), 299 Fed. 65. See also Coon v. Wilson (1885), 113 U. S. 268, 28 L. ed. 963; Parker and Whipple Co. v. Yale Co. (1887), 123 U. S. 87, 31 L. ed. 100; Dunham v. Dennison Mfg. Co. (1894), 154 U. S. 103, 38 L. ed. 924.

In the case at bar, it makes no difference, so far as the defendants are concerned, whether the estoppel theory is applied or whether it is held that the failure of the plaintiff to comply with the requirement promptly to deposit copies makes it impossible for it to maintain a suit for infringement against any party. The former view is no doubt the more equitable and, it is submitted, should be followed. This precludes suit against the



defendants herein, but it would not preclude suit against the defendants or any other party for the use of material appearing in any issue of plaintiff's magazine which was properly registered, and copies deposited, prior to the infringing publication. However, it precludes suit against defendants for sale of copies after plaintiff's compliance with the Act, if such copies were published before compliance. See Bull Dog Floor Clip Co. v. Munson Mfg. Co., supra.

As in the case of a reissue patent, so here, the required initial step was taken. The inventor makes application for patent, the proprietor publishes notice of copyright. But intervening rights may arise because the inventor fails to place his specifications and/or claims in proper form to give him the protection to which his invention entitled him, and <sup>because</sup> the proprietor fails to comply with the requirements of the copyright act in order to qualify to maintain a suit for infringement. Until the proprietor complies, he can no more successfully sue than can the inventor successfully sue for an infringement based upon specifications and claims which might properly have been made, but which were omitted and, therefore, required a reissue patent to cover them. Until the required statutory steps are taken, neither the inventor nor the proprietor can challenge the assumption to which their failure gives rise, namely, that the matter was dedicated to the public, and, until this assumption is rebutted, any acts which might have been actionable if the required statutory steps had been taken ~~give~~ to the performers thereof intervening rights in the form of a license which ~~could~~ <sup>can</sup> only be terminated by the filing of an adequate application for a reissue license by the inventor, or the deposit of copies and application for registration by the proprietor.

(The mere fact that the manufactured article carries a notation of patent, and that the publication carries a notice of



copyright is no indication whatsoever of the extent of the protection which has been actually secured by the inventor and the proprietor, respectively.)

In the present case, the alleged infringing act was the publication of certain material eight months after plaintiff's publication of notice of copyright, and six months before the deposit of copies. Further publication by defendants of the said material may now be said to constitute an infringement, but the plaintiff is clearly estopped to deny the right of defendants to their said publication during the period of the plaintiff's failure properly to protect itself by the deposit of copies as required by the Act.

#### VII.

Plaintiff seeks to strike Paragraph 17(b) of the answer on the ground that the question of the failure of registration of copyright in accordance with the Act was disposed of by Mr. Justice Cox in overruling the motion to dismiss. As previously stated, there was reserved to the defendants the right to raise this same question in the answer, and Paragraph 17(b) of the answer is a further statement of the defendant's contention that the plaintiff never acquired any right which would support a suit against defendants for the alleged infringement of copyright. The legal questions are discussed in Part VI hereof.

Plaintiff states that Paragraph 17(b) of the answer contains no allegation that the copyright itself was abandoned by the plaintiff. Defendants would make no such allegation because of the fact that they contend that plaintiff never secured such a copyright as would support an action for its infringement. They contend, as shown in Part VI, supra, that the failure of the plaintiff to comply with the Act as to deposit of copies and registration was paramount, as a matter of law, to a dedication of the subject matter to the public.



#### VIII.

Plaintiff seeks to strike Paragraph 17(c) of the answer on the ground that it is self-serving and immaterial except for the admission by defendants Liveright and Van Rees Press that they published and sold the book entitled "More Merry-Go-Round". The further answer of these defendants, contained in Paragraph 17(c), merely sets forth that they believe they had full and exclusive right to the publication and use of all material appearing in the said book. This merely again raises the defense already set forth, namely, that the action of Liveright, Inc., in publishing during the fourteen-month period of plaintiff's failure to rebut the presumption of dedication, gave to defendant Liveright an intervening right which is a complete defense to this action.

#### IX.

Plaintiff seeks to strike the allegations of Paragraph 19(a), 22(a), 22(c) and 22(d) on the ground that they are immaterial and irrelevant.

A close examination of Paragraph 19(a) of the answer will disclose that it merely denies the allegations of Paragraph 19 of the bill and in further answer sets up the defense that the plaintiff had never secured exclusive right to the use of the article.

Paragraphs 22(a), 22(c) are merely further answers to the bill itself and set up bases for the defenses interposed. They are not evidence, strictly speaking, but merely matters of procedural fact to facilitate the determination of the questions of law involved. They do not appear to be matters of which this Court may take judicial notice; therefore, if it be held improper to set them forth as part of the defense in the answer, it is submitted that the sufficiency of the defense interposed cannot properly be decided at this point but must await trial on the



merits.

Paragraph 22(d) shows that plaintiff had knowledge of the defendant's alleged infringement many months prior to the plaintiff's compliance with the Act and to the institution of this proceeding. It has a direct bearing upon plaintiff's good faith, and upon this Court's determination of the respective equities of the parties, in that the delay in bringing suit may have been a deliberate effort to augment the prospective damages.

X.

On the third page of the points and authorities submitted by plaintiff in support of its motion to strike, there appears a reference to the memorandum of points and authorities filed by the plaintiff in opposition to the motion of defendants to dismiss the bill. Plaintiff states that its memorandum is "a part of the record and is referred to as part of this memorandum".

It is, of course, a well established fact that motions, and papers filed in connection therewith, become a part of the Clerk's file but not a part of the record, unless they become a part of the record by stipulation of counsel or by order of court. Any reference to papers filed in connection with the motion to dismiss is, therefore, improper.

XI.

The motion to strike should, in all respects, be denied.

Respectfully submitted,

E. H. Hanson

Eliot C. Lovett  
Attorneys for Defendants.

A copy of the foregoing opposition has been served upon the attorneys for plaintiff this 12th day of June, 1933.

E. H. Hanson

Eliot C. Lovett



Holding an Equity Court

THE WASHINGTON PUBLISHING CO., INC.,

Plaintiff,

vs.

DREW PEARSON, et al.,

Defendant.

Equity No. 55,429

FILED

JUL 11 1935


FRANK E. CUNNINGHAM, Clerk.

MEMORANDUM

The motion to strike will be granted as to paragraphs 6-B, 7-A and all of 9 and 22 of the Answer, and otherwise overruled.

Upon the main question, argued before me, I am of the opinion that prompt deposit of copies at the Library is not necessary to complete the copyright. However, the answer contains allegations seeking to raise questions as to whether there was abandonment or dedication to public use. These were not referred to in the argument. I am uncertain whether the questions are properly raised by the <sup>answer</sup> ~~bill~~. Therefore, I think it better that the allegations be allowed to stand for disposition at the time of trial. The long delay in filing copies would seem to be evidence bearing on that question.

July 10, 1935.

  
Justice.



IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA  
Holding an Equity Court

FILED

MAR. 28. 1935.

FRANK E. CUNNINGHAM, CLERK.

THE WASHINGTONIAN PUBLISHING CO., INC.,

Plaintiff,

vs.

DREW PEARSON, et al,

Defendants.

No. 55,429

MEMORANDUM

At the conclusion of the trial I announced that I was satisfied from the evidence that the plaintiff company acquired copyright upon publication of the article with notice of copyright in "The Washingtonian" in its issue of December 10, 1931. Upon announcing such conclusion I reserved for further consideration the question of plaintiff's right to the remedy sought.

The facts which are material to a consideration of the question are stated in chronological form, as follows:

On December 10, 1931 the plaintiff published the last issue of its monthly magazine, The Washingtonian, claiming copyright thereon by means of the usual printed notice. (The claim was not thereupon registered and copies were not thereupon deposited in the Copyright Office.) On August 25, 1932 Liveright, Inc., one of the defendants, published a book entitled "More Merry-Go-Round", written by defendants Pearson and Allen and printed by defendant Van Rees Press, Inc. This book contained matter substantially similar to the contents of an article appearing in the said December, 1931, issue of The Washingtonian. Copyright was claimed by means of the usual printed notice; On August 26, 1932 defendant Liveright deposited two copies of the said book, "More Merry-Go-



Round ", together with claim of copyright, in the Copyright Office, paid the fee, and obtained a certificate of registration; on December 14, 1932 the last edition of " More Merry-Go-Round " was printed; on February 21, 1933 plaintiff deposited copies of the said December, 1931, issue of The Washingtonian, together with claim of copyright, in the Copyright Office, paid the fee, and secured a certificate of registration (On the same day it likewise deposited copies, and obtained registration of claim of copyright, of the other eleven issues, January through November, of 1931.); on March 8, 1933 plaintiff instituted this suit alleging infringement of the article appearing in its said issue of December, 1931.

It thus appears that the plaintiff failed to register its claim of copyright and to deposit copies of the work in question until more than 14 months after publication, approximately six months after the occurrence of the alleged infringing act, and more than two months after the printing of the last edition of the alleged infringing work.

So far as it is pertinent to this discussion, Section 12 of the Copyright Act of 1909, as amended, provides-

"That after copyright has been secured by publication of the work with the notice of copyright as provided in Section nine of this Act, there shall be promptly deposited in the Copyright Office or in the mail, addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, . . . . to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with."

In approaching the question it is necessary to have in mind that at common law an author had the exclusive privilege of first publishing his work or the right to prevent it from being published by others unless he should have first published it himself. He had a right to determine whether or not it should be published at all, and if



published, when, where, by whom and in what form. But this exclusive right was confined to the first publication. When once published, his work was dedicated to the public, and he had no exclusive right to multiply copies of it or to control the subsequent issues of copies by others. This common law right is known as "common law copyright", or "copyright before publication". It is the right which an author has in his manuscript and is a property right. It is so stated by Samuel D. Hirschl in his special lecture "Trade-mark and Copyright Protection in Business".

The rights and remedies of the copyright proprietor, here considered, are created by statute. By the statute certain rights are secured and certain remedies afforded to the copyright proprietor. The rights being created by statute are determined and measured by the provisions of the statute only; but the statute has a double aspect, it not only secures rights to the copyright proprietor but affords him certain remedies as well; and the remedies are only such as are prescribed by the statute.

Clearly the copyright is secured to an author upon the publication of the copyright work with notice of his claim of copyright, but the statute requires more of him before he can avail himself of the remedies given by the statute. Since the remedies are statutory only he is entitled to them only when he has met the requirements of the statute. By complying with the conditions of the statute the copyright proprietor is entitled to recover statutory damages upon proof of such facts only as are made necessary by the language of the statute. In securing his



copyright by publication an author has fixed in law his property rights in the copyright work, but he has not put himself in position to ask or enforce the payment of statutory damages by one who infringes the copyright work. If he wishes to avail himself of the remedies afforded by the statute he must go further and do that which is required by the statute, i.e., he shall promptly deposit in Copyright Office two copies of the copyright work; until he does so he has a naked property right in the copyright work. When he has complied with the statute by promptly depositing the copies in the Copyright Office he has put himself in position to secure the protection of the courts and to recover statutory damages if his copyright work be infringed. The statute confers the property rights in the copyright work upon publication with notice, but the enjoyment and protection of such rights through the remedial processes afforded by the statute are subject to the accomplishment of the conditions and formalities prescribed in the statute. It would seem that the jurisdiction of this court to enforce plaintiff's rights is conferred solely by plaintiff's full compliance with such conditions and formalities.

Sutherland in his work on STATUTORY CONSTRUCTION, Second Edition, Volume II at page 1140 is authority for the proposition that in statutory proceedings the statute must be substantially complied with; every act required which is jurisdictional, or of the essence of the proceeding, or prescribed for the benefit of the party to be affected thereby, must be done; the requirement is



mandatory. At page 1142 he makes the further observation that where a statute confers a new right, privilege or immunity the grant is strictly construed, and the mode prescribed for its acquisition, preservation, enforcement and enjoyment is mandatory. On the same page he says that this is the rule as to copyrights.

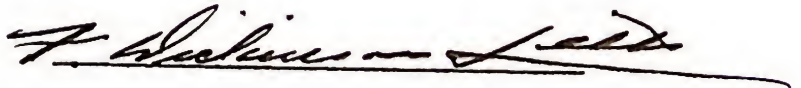
The principles of statutory construction as here applied resemble those which control the construction of enabling statutes. Such statutes impliedly prohibit any other than the statutory mode of doing the acts which they authorize. This is illustrated by numerous cases where statutory rights and remedies are given. It is said that where a statute, in granting a new power, prescribes how it shall be exercised, it can lawfully be exercised in no other way; and in all cases where, by the exercise of such a power, one may be divested of his property, the grant is strictly construed; the mode of proceeding prescribed must be strictly pursued; the provisions regulating the procedure are mandatory as to the essence of the thing required to be done.

I conclude as matter of law that as a condition precedent to plaintiff's right to avail itself of the remedies afforded by the copyright law it was necessary for it to promptly deposit two copies of its publication in the Copyright Office. This it failed to do and only attempted to comply with the statute in that regard some months after the occurrence of the alleged act of infringement. The plaintiff has not therefore made out a case



which will entitle it to the statutory remedy which it seeks. For the reasons assigned plaintiff's bill of complaint will be dismissed, the costs to be assessed against the plaintiff. Section 40 of the Copyright Act permits the award of attorneys' fees as part of the costs within the discretion of the Court; but the Court is not persuaded that attorneys' fees should be so assessed in this case.

Formal orders, necessary for the record, will be presented.

A handwritten signature in dark ink, appearing to read "F. William Law", written over a horizontal line.

Justice



IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

HOLDING AN EQUITY COURT

THE WASHINGTONIAN PUBLISHING CO., INC.)

Plaintiff,

v.

NO. 55,429

DREW PEARSON, et al,

Defendants.

POINTS AND AUTHORITIES ON  
MOTION FOR REHEARING

I

It is submitted that the law of the case was established at an extended hearing and argument before Mr. Justice Proctor upon motion to strike certain portions of the answer filed by the defendants. At that time Justice Proctor entered in the case the following memorandum:

"MEMORANDUM

"The motion to strike will be granted as to paragraphs 6-B, 7-A and all of 9 and 22 of the Answer, and otherwise overruled."

"Upon the main question, argued before me, I am of the opinion that prompt deposit of copies at the Library is not necessary to complete the copyright. However, the answer contains allegations seeking to raise questions as to whether there was abandonment or dedication to public use. These were not referred to in the argument. I am uncertain whether the questions are properly raised by the answer. Therefore, I think it better that the allegations be allowed to stand for disposition at the time of trial. The long delay in filing copies would seem to be evidence bearing on that question."

"July 10, 1933."

"(Signed) James M. Proctor  
Justice."

FILED  
APR 15 1934  
FRANK E. CUNNINGHAM, CLERK



This hearing, as indicated by the foregoing memorandum, left open for consideration the sole question as to whether or not there was an abandonment or dedication of the copyrighted article to public use, and the delay in filing the copies was to be used merely as evidence bearing upon that question.

This memorandum was entered by Justice Proctor after the question had been exhaustively discussed on both sides and the matter fully briefed.

Counsel for the defendants did not press the question of abandonment or dedication for the obvious reason that it is perfectly apparent that literary material which has been properly copyrighted cannot be dedicated to the public use except by authorized publication without the notice of copyright or by licensing some one else to publish the same material.

## II

Our brief filed in this cause prior to the Court's memorandum of March 28 was devoted almost exclusively to an analysis of the Copyright statute and an argument upon principle with respect to the right to sue after deposit of copies for infringement occurring prior thereto. Since the Court's memorandum of March 28, however, we have given closer attention to a judicial examination of this subject and desire now to submit the cases bearing upon the particular point. Two of these cases are exactly in point and sustain the contention made by us in this cause, one an American case and the other an English case under a substantially identical Copyright provision. No cases to the contrary are in the books.



Lumiere v. Pathe Exchange, Inc. et al,  
Circuit Court of Appeals of Second Circuit,  
Judges Ward, Hough and Manton, 275 Fed. 428.

In this case Lumiere, a photographer, took three pictures of Dolores Casinelli, a motion picture actress, and copyrighted them. Thereafter on August 26, 1919, plaintiff sued Pathe Exchange, et al, for infringement, accounting and injunction. On April 17, 1920, Judge Learned Hand dismissed the bill without costs or prejudice and with leave to commence a new action. All parties appealed.

The Circuit Court of Appeals first held that Lumiere who took the pictures of Miss Casinelli had a right under the circumstances to copyright them.

In May, 1919, Miss Casinelli was employed by Pathe Exchange as an actress in "The Unknown Love". Pathe Exchange wished some photographs of Miss Casinelli for publicity purposes. Lumiere refused to sell them without his copyright notice attached. Pathe Exchange then took some of these copyrighted photographs and employed an artist by the name of Michaelson to make two drawings of Miss Casinelli differing from the photographs in details of dress but using the Lumiere photographs for the face. These drawings were published with Michaelson's name substituted for the name of Lumiere in the notice of copyright thereon.

The Circuit Court of Appeals held that such use was an infringement of Lumiere's copyright.

Then the court discussed and decided (beginning at page 429) the question we are interested in here:

"This brings us to the question whether the plaintiff has so complied with the provisions of the copyright act of March 4, 1909 (Compiled Statutes Sections 9517-9524, 9530-9584),



"as to be entitled to maintain this action.

Under Section 11 of that act only one copy of the photographs not to be reproduced for sale need be deposited and the date of publication need not be stated in the certificate of registry under Section 55 but, if they are to be reproduced for sale, two copies must be filed under Section 12, and the date of publication, i. e. the earliest date on which copies were sold (Section 62), must be stated in the certificate of registration under Section 55. In either case copying the photographs, infringed the copyright and the right to recover for infringement committed before a certificate of registration for copies to be reproduced for sale had been abandoned would continue. (Underscoring supplied)

"The plaintiff's copyright was established by the publication with notice of copyright as against all the world whether with or without actual notice and could not be declared void because not 'promptly' followed by deposit of copies as required by the Act except by action of the Register of Copyrights under Section 13, which was not taken.

"The plaintiff relies in his bill upon his having published the photographs with the notice of copyright in accordance with Section 9 and 18 and upon certificate of registration obtained under Section 55 dated August 8, 1918, and a deposit of two copies of each photograph on the same day. The trouble is that the certificates of registration are for photographs not to be reproduced for sale, no date of publication being stated. Section 12 provides that 'no action or proceeding shall be maintained for infringement of copyright in any work until the provisions of the act with respect to the deposit of copies and registration of such work shall have been complied with.

"Deposit of copies and registration is each a condition precedent of the right to maintain an action for infringement. When the bill was filed two copies of each of the photographs had been deposited, but the registration required by the act had not been obtained. The registration relied on is for photographs not to be reproduced for sale, whereas these photographs had been reproduced for sale more than a year before.

"Nevertheless the plaintiff may get a certificate of registration under Section 55 for photographs to be reproduced for sale as required by Section 12, and thereafter may maintain another action, which indeed we are informed has been taken. For this reason the District Judge rightly dismissed the bill without prejudice, and the matter of costs was in his discretion. The parties cannot by agreement, expressed or implied, alter the statute." (Underscoring supplied)

So far as we have been able to learn, this is the only case decided in this particular point in the American courts, although there have been some suggestions to the



Here was have not only the holding of the Circuit Court of Appeals, but the holding of the Judge of the District Court, that the failure to secure the certificate of registration required by the statute did not deprive the copyright owner of the right to sue for damages for infringement occurring prior thereto. The underscoring in the foregoing decision of the Circuit Court of Appeals was placed there by us for the purpose of emphasizing this holding by the two courts.

The Court of Appeals flatly holds that the procuring of the certificate of registration required by the statute, and this would apply equally to the deposit of copies, was a mere condition precedent to the right to bring suit. The court below dismissed the bill but with the right to bring suit upon the same cause of action when the statutory requirement has been complied with, and the Circuit Court of Appeals held this to be right and also dismissed the bill with the express statement that a new suit upon the same cause of action might be brought when the statutory requirement had been complied with.

To the decision in this case (Lumiere v. Pathe Exchange), Judge Hough attached a memorandum showing that he did not wish to be precluded upon this question, but his memorandum does show that he understood that the decision of the court itself was authority for the proposition that compliance with the statutory requirements was merely a condition precedent to bringing suit for damages which had theretofore accrued by reason of infringement.

So far as we have been able to learn, this is the only case decisive of this particular point in the American courts, although there have been some expressions to the



same effect in other cases.

Judge Learned Hand of the District Court heard the case of Lumiere v. Pathe Exchange when it was in the District Court. He was of opinion that the procurement of certificate of registration was merely a condition precedent to bringing suit and that the certificate could be secured and suit maintained for infringement occurring prior thereto, because he dismissed the bill in this case "without costs or prejudice and with leave to commence a new action" after securing the proper registration certificate. This ruling was made on April 17, 1920. This ruling was upheld by the Circuit Court of Appeals in 1921.

In 1923 Judge Hand had before him the copyright case of Millenthal v. Berlin (291 Fed. 714). In this case it is true the question we are now discussing was not before the court, but certain statements made by Judge Hand in the Millenthal case are extremely important when we consider he had before him his own decision and the decision of the Circuit Court of Appeals in the Lumiere case.

In the Millenthal case Judge Hand said: "The purpose of the deposit is to secure two copies of 'the best edition' for the Library of Congress as a condition upon the right to protect the copyright".

Again Judge Hand speaks about the delay by the copyright owner in depositing copies, etc. and says: "He may mend his case even in the event of long delinquency".

Again he says: "In my judgment the time of deposit in Section 12 is permissive".

Finally he says: "The purpose of the Act of 1909 was to open a path for authors beside and not through the quagmire which had been created under the old act".



Here he evidently referred to the old law which made the deposit of copies a condition precedent to procuring copyright as distinguished from the new law in making the deposit of copies, etc. a condition precedent merely to bringing suit for infringement.

Here we have a very able and experienced Judge heartily sustaining the proposition that the present act requires performance of certain things merely as a condition precedent to bringing suit without disturbing any right and being sustained by the Circuit Court of Appeals.

We contend this is the law of the land and should be followed by this court.

This same question, however, has been decided by the British Courts under a statute substantially identical with that contained in the American Copyright law and decided flatly in favor of the proposition that compliance with the statutory requirement of depositing copies, etc. merely postponed the enforcement of the remedy and entitled the copyright proprietor to sue for damages, whenever these requirements had been complied with, which had occurred prior thereto.

Let us then examine this English case.

Goubaud v. Wallace, 36 L. T. N. S. 704.

This case was decided by the Queen's Bench Division of the High Court of Judicature of England in 1877. We deem it important that this case be set out in full as follows:



"High Court of Judicature

"Queens' Bench Division

"1877

"May 11 and 12.

"Goubaud and Another v. Wallace (a)

"Copyright, registration of - condition precedent to action for infringement - 5 & 6 Vict. c. 45, ss. 13, 24.

"The registration of copyright is a condition precedent to suing for infringement, but not to the existence of the copyright itself, and that the infringement took place prior to registration is no defence.

"This was a demurrer to a statement of defence in an action for breach of copyright.

"The statement of claim alleged that the plaintiffs were proprietors of the copyright in a book published in parts, and called "Life of the Earl of Beaconsfield," and had, before action brought, entered their proprietorship in the registry of the Stationers' Company, as required by 5 & 6 Vict. c. 42, s. 24, set forth below, and that the defendant, being the printer and the publisher of the newspaper called the Morning Advertiser, infringed the said copyright by publishing portions of the plaintiffs' book in the said newspaper.

"The material defence was that the plaintiffs had not made the entry required by the statute before the infringement.

"To this defence the plaintiffs demurred, on the ground that the entry need not have been made before infringement.

"The material sections of the Copyright Act 1842, 5 & 6 Vict. c. 45, are as follows:

"13. It shall be lawful for the proprietor of copyright in any book published, or any book hereafter to be published, to make entry in the registry book of the Stationers'



"Company, of the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright in the form in that behalf given in the schedule to this Act annexed, upon payment of the sum of five shillings to the officer of the said company; and it shall be lawful for every such registered proprietor to assign his interest or any portion of his interest therein by making entry in the said book of registry of such assignment, and of the name and place of abode of the assignee thereof, in the form given in that behalf in the said schedule, on payment of the like sum; and such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed.

"24. No proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action or suit at law or in equity, or any summary proceedings in respect of any infringement of such copyright, unless he shall before commencing such action, suit or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company, of such book pursuant to this act: Provided always, that the omission to make such entry, shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid; provided also that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the Act passed in the third year of the reign of his late Majesty King William the Fourth, to amend the laws relating to dramatic literary property, or of this Act, although no entry shall be made in the book of registry aforesaid.

"Atherley Jones, for the plaintiffs, referred to Copinger on Copyright, p. 72, and argued that the words of sect. 24 threw no burden on the proprietor of a copyright to register before action, and that without express words no such burden could exist.

"The Solicitor-General (Sir H. Giffard, Q.C.), with him Buller and Child, for the defendant, cited Cassell v. Stiff (2 K. & J. 279, per Wood, V.C.; 7 & 8 Vict. c. 12), and argued that the intention of the Legislature was that registration should take place immediately on the copyright being acquired, inasmuch as only upon any other



"construction of the law infringements might take place without any knowledge on the part of the present infringer.

"Atherley Jones, in reply, cited Beckford v. Hood (7 T. R. 620).

"Mellor, J. - I have been much perplexed by the consideration of the practical difficulties which may arise from our giving a literal construction to the section, but in the end I have come to the conclusion that we cannot do otherwise than give that construction to it. It is plain that the statute, 5 & 6 Vict. c. 45, affected a material alteration in the law. (The learned judge read sects. 13 and 24 and proceeded:) I am of the opinion that under these sections the registration of copyright is merely a condition precedent to the bringing an action for infringement, and not to the existence of the copyright itself. Registration, in fact, is necessary only to perfect the right to sue, not to create it.

"Field, J. - I am of the opinion that the plaintiffs are entitled to judgment, and on this point I have no doubt whatever. On reading the statute of Anne and other statutes in pari materia, I have come to the conclusion not only that the language is clear, but also that the language carries out the intention of the Legislature.

"The statute of Anne recognized the existence of copyright, but protected it only by the imposition of penalties for piracy.

"Not long before the passing of the statute of Anne came Beckford v. Hood (ubi sup.) in which it was held that an action lay for infringement notwithstanding the penalties, the imposition of which, by the statute,



"it had before been though, barred the possessor of the copyright of the remedy by action. It seems perhaps unnecessary to give a specific remedy by action on the case as it is given by 5 & 6 Vict. c. 45, s. 15. Now the Solicitor-General relied on sect. 24 of 5 & 6 Vict. c. 45, and argued that it could never have been intended that that section should allow the proprietor of a copyright to delay registration as long as he pleased, so long as he registered before action. Before looking to 5 & 6 Vict. c. 100, passed in the same session, with reference to copyright of designs, we find that where the intention was different, different words are used. By sect. 4 of this Act it is enacted that "no person shall be entitled to take the benefit of this Act, with regard to any design in respect of the application thereof to ornamenting any article of manufacturing, or any such substance, unless such design have before publication thereof, been registered according to this Act. \* \* \* \*"

"To see the object of registration, we must look at the words of the statute, and these show a clear intention on the part of the Legislature to alter the law. They had the clause of the statute of Anne before them, and might have adopted it if they pleased, but they did not adopt it. The preamble of 5 & 6 Vict. c. 45, shows that they intended to go beyond that clause. This preamble states that it is expedient to amend the law relating to copyright and to afford greater encouragement to the production of literary works of lasting benefit to the world. It is clear, therefore, that the Legislature intended to alter the law, and to give the



"right of action at once.

"Judgment for plaintiffs.

"Solicitors for the plaintiffs, Merriman and Morris

"Solicitors for the defendants, H. J. and T. Child"

This case discloses an interesting parallel between the development of the British copyright law and the American copyright law with respect to deposit of copies and the procurement of registration. Prior to the British Copyright Act of 1842 it would seem that deposit of copies and securing of registration was a condition precedent to procuring copyright but that the Act of 1842, 5 & 6 Vict. c. 45, changed this law so as to make deposit of copies and the procurement of registration, after publication, merely a condition precedent to the institution of suit. Similarly, prior to the American Act of 1909 the deposit of copies and securing of registration was a condition precedent to securing the copyright, but this law was changed by the Copyright Act of 1909.

The foregoing English decisions, therefore, is exactly in point, and disposes of the question now under consideration upon principle due to the practically identical provisions of the English and American Copyright Acts. An analysis will show that the British Act and the American Act upon the same subject are identical in meaning.

The American Act says: "No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with".

The English Act provides: "No proprietor of







The decision of the British court is, of course, not binding upon the courts of this country. Nevertheless, since the meaning of the British provision is identical with that of the American provision, and the British decision is rendered upon principle which is manifestly sound, and, as shown by his Lordship North, J. in Cate v. Devonshire Newspaper Co. (hereinafter discussed) which was decided twelve years after the decision in Goubaud v. Wallace holding that the universal, and as he calls it the notorious practice, of authors and publishers in England was to delay the filing of copies and securing of registration until there had been an infringement and then they performed these statutory requirements and instituted suits for past infringements, we think the reasoning and authority of that case should be controlling here unless some good reason is shown why the American doctrine should not be different from the British doctrine.

Another English case which, though not dealing with the exact question here involved, is extremely illuminating on the subject, and discloses the practice in England subsequent to the Goubaud case is

Cate v. Devonshire Newspaper Co.,  
L. R. 40, Ch. D. 500

This is an English case decided in 1889 by the Supreme Court of Judicature. North, J. delivering the opinion of the court.

A simple statement of this case is as follows:

Cate owned a publication which he called the "Commercial Compendium", in which he published periodically business data, such as bankruptcies, failures, assignments for benefit of creditors, etc., and this publication was sent regularly to his subscribers. One of his subscribers



was the "London Association for Protection of Trade". Instead of sending his publication entitled "Commercial Compendium" to this subscriber he printed a large number of his publications and entitled them "London Association for Protection of Trade" and sent them to this subscriber who distributed them to its members.

The defendant, a newspaper, which was one of the members or subscribers receiving the publication from "London Association for Protection of Trade" published on several occasions some of the material from this publication, and Cate sued for infringement.

The publication entitled "Commercial Compendium" was registered at the Copyright Office which was required to entitle the plaintiff to sue for infringement.

The publication which the defendant received and from which it copied certain of the material in its newspaper was not registered at the copyright office under the title of "London Association for Protection of Trade", but the publication under this title carried a notice that it was confidential information for the subscribers to whom it was sent.

In the court of his opinion, North, J. had occasion to discuss the question of the right to sue as related to the duty to register at the copyright office. His Lordship said:

"It is well known that registration is only necessary as a condition precedent to suing; and the almost universal practice on the part of large publishers notoriously is that they do not register until just on the eve of taking some proceeding; then they take care to register their copyright and sue upon it. I think, therefore, that the contention that the defendants have not been warned by registration of the title under which the document appears is not one which can be sustained. Further it seems to me impossible for the defendants here to say that they have been misled by the silence of the plaintiffs on the subject into publishing what they have done, because when



"they look at the document which they have received, there is a direct warning at the head of it that it is strictly private and confidential and is not to be used for the purpose of publication. They, therefore, if they choose to publish it, cannot say that they have been misled into the belief that they would be justified in publishing the contents of that paper because they have been expressly warned by the paper itself that they had not any such right."

This opinion is extremely illuminating for two reasons. First that his Lordship flatly holds that the registration is merely a condition precedent to bringing suit and that the practice in all England is notoriously that publishers habitually wait until their copyrighted material has been infringed and then only do they register in order to bring suit for infringement which has already occurred.

Second: We are also interested in what his Lordship said in connection with the matter because we have formerly pointed out in our brief that pirates cannot complain that they have been misled when upon the face of the very paper they have pirated they have been given notice and warning, as was true in this case, where the notice of copyright was printed on the magazine itself, that they had no right to publish what they were publishing.

The theory that copyright owner has a bare legal right prior to deposit of copies and securing registration is unsound on principle.

On principle, a holding that prior to the deposit of copies and securing of registration the copyright owner has only a bare legal right is unsound.

The mere statement of the case is its own refutation. It is settled law, and so held by the court in this case, that the copyright proprietor secures a copyright on publication with notice, but the very nature of the case precludes a holding that the right acquired can be a bare legal right. The right acquired



on securing a copyright is not merely a right to do something - it is a right to exclusively do something - exclusively publish, republish, vend, etc. the copyrighted article.

If others may also publish the same material after the copyright owner has secured his copyright by publication with notice, then the right of the copyright owner ( which is a right to exclusively publish) is taken away altogether, because everybody else has the same right and the copyright owner then has no more right than he had at common law. Therefore to say that he has a bare legal right voids the copyright altogether because when others have also the right to publish (which they may do without claiming copyright) the copyrighted literary work is dedicated to the public and is lost to the copyright owner forever. The statement, therefore, that he has a bare legal right is not only inconsistent with the statement that he has a copyright, but is equivalent to saying that he has no right whatever. The proposition, therefore, is unsound on principle.

For the violation of any right there is a remedy or else the right itself is destroyed.

For every right there is a remedy and where there is no remedy the right is lost. The authorities might be multiplied upon this subject.

(See 1 C. J. 985 and notes)

It certainly cannot be said that Congress in the copyright act intended, either expressly or by implication, to destroy the copyright by merely postponing the remedy until certain things had been done. The avowed purpose of Congress in changing the old law by the Act of 1909 was to avoid the very thing which the proposed holding of the court would result in.



A practical and consistent interpretation of the Act as made by Judge Hand in the Millenthal and Lumiere cases in the District Court, and affirmed by the Circuit Court of Appeals in the Lumiere case, and as made by the British Courts in the cases herein discussed, support and preserve the fundamental principle that where you destroy the remedy you destroy also the right. Any other construction, at least that one which it is here proposed to be placed upon the Act, would destroy, rather than preserve, the rights conferred by the Copyright Act. Obviously no such intention was ever entertained by Congress or in any was expressed in the Copyright Act. The only way to preserve the rights given to the author or publisher who is protected by the Act is to construe the matter now under consideration exactly as it has been construed by our Circuit Court of Appeals and the British High Court of Judicature.

As was decided by the court in Lumiere v. Pathe Exchange, (supra) and in the District Court below, the requirements with respect to deposit of copies, securing registration, etc. were mere conditions precedent to the right to file suit and that a suit might be brought after doing these things for an infringement theretofore occurring; also as was said by the court in both English cases heretofore cited, the doing of the things required by the statute are merely conditions precedent to the right to sue for the wrong that had been committed.



We therefore submit that all of the authority that has been found is to the effect that Congress intended merely to postpone the remedy and not to deprive the copyright owner of any rights, and that whenever the copyright owner has complied with the statutory requirements by deposit of copies and securing registration his remedy then extends to any prior infringement of his rights. Any other conclusion would destroy the copyright altogether. Such is not the law here nor the law or practice for many years in England under a substantially identical statute.

Respectfully submitted,

Gibbs L. Baker  
GIBBS L. BAKER

Ashby Williams  
ASHBY WILLIAMS

ATTORNEYS FOR PLAINTIFF  
815-15th St.N.W.  
Washington, D. C.

Receipt of copy of the hereinbefore memorandum of points and authorities is hereby acknowledged this 15<sup>th</sup> day of April, 1935.

Eliot C. Lovett  
ELIOT C. LOVETT

Elisha Hanson  
ELISHA HANSON

ATTORNEYS FOR DEFENDANTS  
729 - 15th St.N.W.  
Washington, D.C.



WASHINGTONIAN PUBLISHING CO., PLAINTIFF,

vs.

DREW PEARSON, et al., DEFENDANTS.

No. 55429

EQUITY.

I, ELIOT C. LOVETT, Attorney of Record in above entitled cause, do hereby certify that the following-named persons attended Court as witnesses on behalf of ~~plaintiffs~~ defendants the number of days set opposite their names, to wit:

LOUIS C. SMITH 643 Sixth Street, N. E.	3	
W. E. EVANS Care Judd & Detweiler	3	
J. W. RIXIE SMITH Hotel Roosevelt	2	
JOHN H. DAVIS Care Judd & Detweiler	2	
JULIUS I. PEYSER 1518 K Street, N. W.	1	

Eliot C. Lovett

Attorney for Defendants.

April 10, 1935.



IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA  
HOLDING AN EQUITY COURT

THE WASHINGTONIAN PUBLISHING CO., INC., )  
Plaintiff, )

v. )

No. 55429. )

DREW PEARSON, et al, )

Defendants. )

FILED

STATEMENT OF POINTS AND AUTHORITIES IN OPPOSITION  
TO PLAINTIFF'S MOTION FOR REHEARING.

MAY 24 1935  
FRANK E. CUNNINGHAM, CLERK.

The defendants, Drew Pearson and Robert Allen, file this their statement of points and authorities in opposition to the motion of the plaintiff herein for a rehearing of the above entitled cause, and in support thereof state:

I.

The decision of the Court herein, acting through Mr. Justice Letts, is not contrary to the Memorandum Opinion of this Court, acting through Mr. Justice Proctor, upon the plaintiff's motion to strike parts of the defendants' answer.

Mr. Justice Proctor stated that he was of the opinion that prompt deposit of copies was not necessary to complete the copyright, yet he concluded that the long delay in filing copies in this case seemed to be evidence bearing upon other questions raised by defendants.

Mr. Justice Letts also held that the deposit of copies was not necessary to complete the copyright, but he concluded that, at least under the circumstances of this case, the failure of the plaintiff to comply with the Statute requiring a prompt deposit defeated its right to recover against the defendants.



## II.

Even though the decision of Mr. Justice Letts were incompatible with the memorandum opinion of Mr. Justice Proctor it would nevertheless be decisive and would not be subject to re-hearing because of the said prior memorandum opinion.

It is needless to say that both Mr. Justice Letts and Mr. Justice Proctor acted for the Court in each instance and in accordance with the facts and arguments presented. However, Mr. Justice Proctor's opinion was based upon a preliminary motion whereas Mr. Justice Letts decided the case after having heard testimony and argument extending over a period of approximately three days, and after having considered exhaustive briefs filed by both sides. In rendering his opinion Mr. Justice Letts, as aforesaid, acted for the entire Court, including Mr. Justice Proctor, and if this opinion be considered inconsistent with the preliminary conclusion reached by Mr. Justice Proctor it must be held to have over-ruled the latter.

## III.

The motion presents no new questions.

The motion states in effect that the decision of Mr. Justice Letts is contrary to law. An examination of the 19-page statement of points and authorities in support of the motion indicates that it is based primarily upon English authorities, the principal case having been decided approximately 50 years ago. These authorities were readily available to plaintiff at the time its previous brief was filed. Furthermore, they show no similarity to the present case either in fact or in law. The law, in particular, is shown to be quite different from that involved in this case, because the English law omitted any provision for promptness in the deposit of copies and the registration of copyright. (See pages 8 and 9 of plaintiff's Points



and Authorities.) The requirement of our copyright law for prompt deposit and registration, and the failure of the plaintiff to have complied therewith, appears to be the very basis of the well considered opinion of Mr. Justice Letts.

IV.

In view of the foregoing it is clear that the Motion for Rehearing should be denied.

Respectfully submitted,

Elisha Hanson

Eliot C. Lovett

Attorneys for Defendants.

Copy of the foregoing Statement of Points and Authorities in Opposition to Plaintiff's Motion for Rehearing served upon attorneys for plaintiff this 28th day of May, 1935.

Elisha Hanson

Eliot C. Lovett

Attorneys for Defendants.



October 7, 1935.

Honorable F. Dickinson Letts,  
Supreme Court of District of Columbia,  
Fifth and D Streets, Northwest,  
Washington, D. C.

Re: Washingtonian Publishing Company, Incorporated,  
v.  
Drew, Pearson et als, No. 55429.

Dear Judge Letts:

At the argument of this case on October 1, you asked me what Lumiere sued for in Lumiere v. Pathe Exchange, Incorporated, et als, 275 Fed. (CCA) 428, i.e., whether he sued for statutory damages.

What Lumiere sued for was stated by the Circuit Court of Appeals to be "infringement, accounting and injunction". I did not consider this sufficient, however, to answer your question and I therefore wrote Messrs. Coudert Bros. who represented the defendant in the case and they informed me that the prayer in Lumiere's petition or bill was as follows:

"WHEREFORE, complainant prays that the defendants may be restrained by injunction preliminary until final hearing and perpetually thereafter from publishing, selling or exposing for sale, or causing the same in any way, by their employees or otherwise, copies of the photographs of the said Dolores Cassinelli and that an order be made directing the said defendants to answer the allegations herein and deliver up to the duly authorized officer of this Honorable Court all of the said infringing copies to be impounded until further ordered, and that an account be rendered to complainant showing the exact number of said infringing copies so published or caused to be published by defendants, and that defendants pay to complainant all damages suffered from such unlawful publications, and all costs of this suit, including a reasonable attorneys fee,



and such other and further relief as the Honorable Court may, in its wisdom, deem just and equitable."


You will observe that Lumiere prayed for what the statute authorized him to sue for in case of infringement, and I believe this fact clears up the question you raised.

It is interesting to note that in the Lumiere case (See the quotation on page 4 of my last brief beginning "The plaintiff relies" and including the next paragraph) while the statute (Section 12) required the photographs to be promptly deposited they were not deposited for "more than a year" after they had been reproduced for sale, and that distinguished counsel (Coudert Brothers) did not even raise this question in defense of the suit.

I am aware that a statute imposing a penalty must be strictly construed, but Section 25 of the Copyright Act (the section establishing the measure of damage for infringement) expressly states that these damages "shall not be regarded as a penalty".

I believe the decision in the Lumiere case should be controlling until a different view is taken by the Court of Appeals or the Supreme Court.

Yours very sincerely,

  
ASHBY WILLIAMS.

Copy to:  
Mr. Elliot Lovett,  
Attorney at Law,  
Hibbs Building,  
Washington, D. C.



The Washingtonian Publishing Co., Inc.,  
Plaintiff,

v.

Drew Pearson, et al,

Defendants.

No. 55429.

FILED

FEB 10 1936

FRANK E. CONNINGHAM, Clerk.

MEMORANDUM

Since writing the memorandum filed March 28, 1935 plaintiff's motion for re-hearing has been filed and submitted. Upon consideration of such motion my attention has been directed to the case of Lumiere vs. Pathe Exchange, Inc., et al, 275 Fed. 428, and certain English cases notably Goubaud & Another vs. Wallace decided by the High Court of Judicature in May, 1877.

An examination of these authorities and others furnished by plaintiff in support of the motion for re-hearing persuaded me that the conclusion expressed in my memorandum of March 28, 1935 is erroneous.

It follows that the motion for re-hearing should be granted. An appropriate order may be presented granting such motion.

*F. Robinson*

Justice

*Corrected notified  
2/10/36 JKB*



IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA  
Holding an Equity Court

THE WASHINGTONIAN PUBLISHING CO., INC.,

Plaintiff,

vs.

DREW PEARSON, et al.,

Defendants.

Equity No. 55429

FILED

FEB 27 1936

FRANK E. CUNNINGHAM, Clerk.

ORDER

Upon consideration of the Motion for Rehearing filed by  
plaintiff, and of the argument thereon, it is by the Court this  
27<sup>th</sup> day of February, 1936,

ORDERED that plaintiff's Motion for Rehearing be, and  
the same hereby is, granted.

*[Signature]*

Justice

*5 cc due  
Alan B. David*

*7/16/33*



THE WASHINGTONIAN PUBLISHING CO., INC.,

Plaintiff,

vs.

DREW PEARSON, et al.,

Defendants.

Equity No. 55,429

FILED

JAN 15 1943

ORDER OVERRULING COUNTER-MOTION AND GRANTINGMOTION TO STRIKE MOTION FOR NEW TRIAL

CHARLES E. STEWART, Clerk

This cause coming on to be heard upon the motion of the defendants to strike the motion for a new trial filed by the plaintiff, and also upon the counter-motion filed by plaintiff, together with the points and authorities filed in support and in opposition, and the oral argument of counsel, it is, by the Court, after due consideration, this 15th day of January, 1943,

## O R D E R E D -

1. That the plaintiff's counter-motion be and the same hereby is overruled.

2. That the defendants' motion to strike plaintiff's motion for a new trial be and the same hereby is granted.

*F. Robinson L. Bell*  
JUSTICE

Seen:

*Harold S. Whitman*

*Edwards L. Baker*

Attorneys for Plaintiff



**The President of the United States of America**

*To the Honorable the Justices of the District Court of the  
United States for the District of Columbia,*

*Equity 55429*

**FILED**  
**FEB 2 - 1944**

CHARLES E. STEWART, Clerk

GREETING:

**Whereas**, lately in the District Court of the United States for the District of Columbia, before you or some of you, in a cause between The Washingtonian Publishing Co., Inc., plaintiff, and Drew Pearson, et al., defendants, Equity No. 55,429, wherein the judgment of the said District Court entered in said cause on the 18th day of December, 1942, is in the following words, viz:

Upon final consideration of this cause, including the Order and Findings of Fact and Conclusions of Law filed this date, it is by the Court this 18 day of December, 1942,

ADJUDGED, ORDERED and DECREED as follows:

FIRST. That the plaintiff recover of and from the defendants Drew Pearson and Robert S. Allen, jointly, the sum of \$15.46, and that the plaintiff have execution therefor.

SECOND. That the plaintiff recover of and from the defendant Liveright, Inc., the sum of \$3,072.25, and that the plaintiff have execution therefor.

THIRD. That the claim of the plaintiff against the defendant Van Rees Press, Inc., be and the same hereby is dismissed except as to costs.

FOURTH. That the plaintiff recover from all of the defendants, jointly, full costs herein, to be taxed by the clerk.

F. Dickinson Letts,  
Justice.



*Lord one thousand nine hundred and forty-three* —, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and ————adjudged ———— by this court that the judgment ———— of the said District Court appealed from in this cause be, and the same is hereby, affirmed with costs, and that the said defendants recover against the said Plaintiff The Washington<sup>ian</sup> Publishing Co., Inc., Ten Dollars and Fifty Cents for their costs herein expended and have execution therefor.

January 17, 1944.



You, Therefore, Are Hereby Commanded that such execution and  
\_\_\_\_\_ proceedings be had in said cause \_\_\_\_\_

\_\_\_\_\_ as according to  
right and justice and the laws of the United States ought to be had, the said appeal  
notwithstanding.

Witness the Honorable HARLAN F. STONE, Chief Justice of  
the United States, the second \_\_\_\_\_ day of February \_\_\_\_\_, in the  
year of our Lord one thousand nine hundred and forty-four.

COSTS OF Defendants:

Clerk	\$ 5.50
Attorney	\$ 5.00
	<u>\$ 10.50</u>

Plus actual cost of printing briefs, with the  
appendices, in an amount not exceeding \$2.00 per  
printed page of text and at rates not exceeding  
those generally charged in the District of Columbia  
for inserts, tabular matter, lithographing, and  
similar matter.

*Joseph W. Stewart*  
Clerk of the United States Court of Appeals for the District of Columbia.

Civil  
Action No.

vs.

Order for



ELISHA HANSON  
ELIOT C. LOVETT  
GEORGE N. DALE  
J. MARK TRICE  
CHAS. S. SYKES  
RALPH S. FOWLER

CABLE ADDRESS "HANSON"

SECURITIES BUILDING  
729 FIFTEENTH STREET  
WASHINGTON, D. C.

November 18, 1931.

*pg 55429*

*Place in file  
JKB  
Per Ltr. J.*

Mrs. Marion Bannister,  
1703 L Street, N. W.,  
Washington, D. C.

My dear Mrs. Bannister:

Mr. Pearson has referred your letter of  
November 17th to me.

At the present time, I am carrying on cer-  
tain negotiations with the Receivers of  
the Mayflower Hotel for the acquisition  
of The Washingtonian by Mr. Pearson and a  
group of his associates.

Until these negotiations are concluded,  
Mr. Pearson and his group will not contri-  
bute further articles to the magazine.  
Just as soon as they are completed, I shall  
let you know the result.

Very truly yours,

*Elisha Hanson*